Mohd Affandi bin Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCvC-190–11 OF 2019
EVROL MARIETTE PETERS J
15 MAY 2022

Land Law — Indefeasibility of title and interests — Bare trust — Whether plaintiffs had proven they were rightful owners of four pieces of lands and that their predecessors in title had fully paid the purchase prices for the lands — Whether vendor of those lands held them as bare trustee for the plaintiffs and had no right to deal with the lands — Whether vendor's act of transferring two pieces of the lands to third party and that party's charging of those lands to a bank were all invalid and null and void and had to be set aside — Whether dealings pertaining to the lands between vendor and third party and between third party and bank were not done in good faith

The plaintiffs were the joint administrators of the estate of Ahmad bin Buang (deceased) ('Ahmad'). The first and second defendants ('D1' and 'D2') were property developers whilst the third defendant ('D3') was a bank. In the instant action, the plaintiffs claimed ownership of four lots of land ('the lands'), namely, Lots 430, 607, 716 and 97. In respect of Lots 607, 716 and 97, the plaintiffs claimed they were the rightful owners of those lands in their capacity as administrators of Ahmad's estate on the ground that Ahmad had bought those three lots from D1, fully paid the purchase prices for them and then entered into occupation of those lots until the time of his passing. The first plaintiff ('P1') separately claimed beneficial ownership of Lot 430 which one Yusof bin Hashim ('Yusof'), who had since died, had assigned to him after Yusof had bought Lot 430 from D1 and had fully paid the purchase price for it. Following the assignment, P1 had taken possession of Lot 430 and had been paying the quit rent and assessment rates for that lot since. The plaintiffs complained that despite D1 having received the full purchase prices for all the lands, Lots 430 and 607 continued to remain registered in D1's name whilst D1 had transferred Lots 97 and 716 to D2 which, in turn, had charged the two lots to D3. The plaintiffs contended that, at all material times, D1 held the lands on trust for them as administrators/assignee and had no right to deal with the properties; hence, the purported transfers of Lots 97 and 716 to D2 and D2's charging of those lots to D3 were all invalid and null and void and had to be set aside. Following its winding up, D1 did not adduce any evidence at the trial to challenge the plaintiffs' claim. D1 had counterclaimed for vacant possession of Lots 430 and 607 and damages for loss of use of those two lots whilst D2 had counterclaimed, inter alia, for damages in the amount of the

value or selling prices of the two said lots, including legal costs and costs involved in the transfer of those lots.

Held, allowing the plaintiffs' claims and dismissing the defendants' counterclaims:

(1) On balance of probabilities, the plaintiffs had proven their claims against D1 with regard to all the lands. Consequently, the plaintiffs' claims with regard to Lots 97 and 716 against D2 and D3 were also established (see para 126).

(2) The documentary evidence proved that Yusof and Ahmad had fully paid their respective purchase prices for the lands to D1. Hence, D1 became the bare trustee for Yusof with regard to Lot 430 and for Ahmad with regard to Lots 97, 607 and 716 and eventually for P1 as Yusof's assignee, and both plaintiffs as co-administrators of Ahmad's estate. Pursuant to s 340(4)(b) of the National Land Code, D1 was contractually and conscientiously obliged to have registered Lot 430 in the name of Yusof/P1 and the other three lots in the name of Ahmad/the first plaintiff (see paras 30–31, 33, 44 & 62).

(3) Since they were claiming as beneficiaries under a trust, the plaintiffs' claims against D1 with regard to all the lots were not time-barred under the Limitation Act 1953. In any case, the evidence showed that until the filing of the instant action, D1 had never denied the rights of Yusof or Ahmad or P1 to the lands. If D1 had intended to exclude Yusof, Ahmad or the plaintiffs, it ought to have taken possession of the lots, which it never did. As such, laches or delay was not a bar to the instant action since possession itself by Ahmad and Yusof was an assertion on their part of their rights under their contracts of purchase whilst acquiescence of their possession was a recognition by D1 of their rights (see paras 64, 68 & 74).

(4) Since D2 had failed to prove that it was a bona fide purchaser for valuable consideration, its title was defeated. As such, the charges it registered in favour of D3 were also defeated since D3 claimed under D2. In any event, D3 had also failed to prove that it was a bona fide purchaser. The court found that D2 was a mere volunteer and had not acquired title to Lots 97 and 716 in good faith and with valuable consideration leading to the conclusion that D2's title to those two lots must be set aside (see paras 100, 105, 107 & 127).

(5) The plaintiffs' claim for general damages was dismissed as there was no justification for it. The counterclaims of the defendants were also dismissed as they were not proven on balance of probabilities (see paras 128–129).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pentadbir bersama harta pusaka Ahmad bin Buang (si mati) ('Ahmad'). Defendan pertama dan kedua ('D1' dan 'D2') adalah pemaju hartanah manakala defendan ketiga ('D3') adalah bank. Dalam tindakan ini, plaintif-plaintif menuntut hak pemilikan empat lot tanah ('tanah-tanah') iaitu Lot 430, 607, 716 dan 97. Berkenaan dengan Lot 607, 716 dan 97, plaintif mendakwa mereka adalah pemilik sah tanah-tanah tersebut atas kapasiti mereka sebagai pentadbir harta pusaka Ahmad atas alasan Ahmad telah membeli tiga lot tersebut daripada D1, membayar sepenuhnya harga pembelian dan kemudiannya menduduki lot-lot tersebut sehingga waktu kematiannya. Plaintif pertama ('P1') secara berasingan mendakwa mempunyai pemilikan berkepentingan Lot 430 yang mana Yusof bin Hashim ('Yusof'), yang telah meninggal dunia, telah menyerahkan kepadanya Lot 430 setelah membelinya daripada D1 dan telah membayar sepenuhnya harga pembeliannya. Berikutan penyerahan itu, P1 telah mengambil alih Lot 430 dan telah membayar cukai pintu dan kadar taksiran bagi lot tersebut sejak pembelian lot tersebut. Plaintif-plaintif menghujahkan bahawa walaupun D1 telah menerima harga pembelian penuh bagi semua tanah tersebut, Lot 430 dan 607 terus kekal didaftarkan atas nama D1 manakala D1 telah memindahkan Lot 97 dan 716 kepada D2 yang seterusnya mencagarkan dua lot tersebut kepada D3. Plaintif menghujahkan bahawa, pada setiap masa material, D1 memiliki tanah secara amanah untuk mereka sebagai pentadbir/penerima serah hak dan tidak mempunyai hak untuk berurusan dengan tanah-tanah itu; oleh itu, pemindahan Lot 97 dan 716 kepada D2 dan D2 yang dicagarkan bagi lot tersebut kepada D3 adalah tidak sah dan terbatal dan harus diketepikan. Selepas penggulungannya, D1 tidak mengemukakan sebarang keterangan di dalam perbicaraan untuk mencabar tuntutan plaintif-plaintif. D1 menuntut balas bagi ganti rugi bagi pemilikan kosong Lot 430 dan 607 dan ganti rugi bagi kehilangan penggunaan kedua-dua lot tersebut manakala D2 menuntut balas, antara lain, bagi ganti rugi dalam jumlah nilai atau harga jualan kedua-dua lot tersebut, termasuk kos guaman dan kos yang terlibat dalam pemindahan lot-lot tersebut.

Diputuskan, membenarkan tuntutan plaintif-plaintif dan mengenepikan tuntutan balas defendan-defendan:

(1) Di atas imbangan kebarangkalian, plaintif-plaintif telah membuktikan tuntutan mereka terhadap D1 berkenaan semua tanah tersebut. Oleh itu, tuntutan plaintif-plaintif mengenai Lot 97 dan 716 terhadap D2 dan D3 juga telah berjaya dibuktikan (lihat perenggan 126).

(2) Keterangan dokumen telah membuktikan bahawa Yusof dan Ahmad telah membayar sepenuhnya harga pembelian tanah masing-masing kepada D1. Oleh itu, D1 menjadi pemegang amanah bagi Yusof untuk Lot 430 dan Ahmad untuk Lot 97, 607 dan 716 dan P1 sebagai

pemegang serah hak kepada Yusof serta kepada kedua-dua plaintif sebagai pentadbir bersama harta pusaka Ahmad. Menurut s 340(4)(b) Kanun Tanah Negara, D1 secara kontrak mempunyai kewajipan untuk mendaftarkan Lot 430 atas nama Yusof/P1 dan tiga lot lain atas nama Ahmad/plaintif pertama (lihat perenggan 30–31, 33, 44 & 62).

(3) Memandangkan mereka telah menuntut sebagai benefisiari di bawah amanah, tuntutan plaintif-plaintif terhadap D1 mengenai dengan semua lot tanah tersebut tidak dihalang oleh had masa di bawah Akta Had Masa 1953. Walau bagaimanapun, keterangan menunjukkan bahawa sehingga tindakan ini diambil, D1 tidak pernah menafikan hak Yusof atau Ahmad atau P1 terhadap tanah-tanah tersebut. Jika D1 berniat untuk mengecualikan Yusof, Ahmad atau plaintif, mereka sepatutnya mengambil milikan lot-lot tersebut dan ianya tidak pernah dilakukannya. Oleh itu, kelengahan dan kelewatan bukanlah penghalang kepada tindakan ini kerana Ahmad dan Yusof sendiri menegaskan bahawa pemilikan itu di pihak mereka dan mereka mempunyai hak di bawah kontrak pembelian mereka dan persetujuan hak pemilikan tanah tersebut juga diiktiraf oleh D1 (lihat perenggan 64, 68 & 74).

(4) Memandangkan D2 gagal membuktikan bahawa dia adalah pembeli bona fide atas balasan jual beli tersebut, hak miliknya boleh dicabar. Oleh itu, cagaran yang didaftarkan kepada D3 juga dibatalkan memandangkan D3 menuntut di bawah D2. Dalam apa jua keadaan, D3 juga gagal membuktikan bahawa mereka adalah pembeli bona fide. Mahkamah mendapati bahawa D2 adalah pembeli sukarela semata-mata dan tidak memperoleh hak milik Lot 97 dan 716 dengan niat baik dan dengan balasan yang berharga yang membawa kepada kesimpulan bahawa hak milik D2 kepada kedua-dua lot itu haruslah diketepikan (lihat perenggan 100, 105, 107 & 127).

(5) Tuntutan plaintif-plaintif bagi ganti rugi am ditolak kerana tiada justifikasi untuk tuntutan ini dibuat. Tuntutan balas defendan-defendan juga ditolak kerana mereka gagal membuktikan kes mereka atas imbangan kebarangkalian (lihat perenggan 128–129).]

Cases referred to

Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals [2007] 4 MLJ 489; [2007] 3 CLJ 97, CA (folld)

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers [1997] 4 MLJ 532; [1996] 2 CLJ 667, HC (refd)

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (folld)

Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad

& Ors [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)
Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor [2007] 1 MLJ 101; [2006] 4 CLJ 878, CA (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)
Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64; [2013] 5 CLJ 949, FC (refd)
Ghazali bin Arifin v Ahmad bin Bakar & Ors [1992] 1 MLJ 282, HC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48, HC (refd)
Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd [2020] 12 MLJ 786, HC (distd)
Harold Elliot Ltd v Pierson [1948] 1 Ch 452 (refd)
Holroyd v Marshall [1862] 11 ER 999, HL (refd)
JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal [2016] 1 MLJ 341, CA (refd)
Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors [2014] 11 MLJ 422, HC (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)
Kubota Agricultural Machineary Sdn Bhd v Sharizan Sdn Berhad & Anor [2001] MLJU 71; [2001] 6 CLJ 104, HC (refd)
Lindsay Petroleum Company v Hurd (1874) LRPC 221, PC (refd)
Lysaght v Edwards (1876) 2 Ch D 499, Ch D (refd)
Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin [2015] 5 SLR 62, CA (refd)
Mills v Haywood (1877) 6 Ch D 196, CA (refd)
Mt Bolo v Mt Koklan & Ors [1930] AIR PC 270 (folld)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Noraini bt Mohamed Hadi v Pembangunan Tanah dan Perumahan Sdn Bhd and another appeal [2021] 4 MLJ 152; [2020] 4 MLRA 158, CA (folld)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (refd)
Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim [2009] 2 MLJ 685; [2008] 1 LNS 669, CA (refd)
Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553; [2019] 3 CLJ 441, FC (distd)
Rokiah bt Amat v Pembangunan Tanah dan Perumahan Sdn Bhd & Anor [2021] 6 MLJ 877; [2021] MLRAU 144, CA (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)
Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors [2009] 2 MLJ 765, CA (refd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
Sim Tiew Bee v PP [1973] 2 MLJ 200, FC (refd)
Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai [1997] 1 MLJ 403; [1964] 1 LNS 57, CA (refd)

A *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43, CA (refd)

T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd [2018] 5 MLJ
B 711; [2018] 6 CLJ 1, FC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Williams v Greatrex [1957] 1 WLR 31, CA (refd)

Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd [2004] 4 SLR(R) 365, HC (refd)
C *Wong Sin Meng v Wong Sum Moi & Anor* [1991] 2 MLJ 277, HC (folld)

Legislation referred to

Evidence Act 1950 ss 32, 32(1), (1)(b), 73A(1), (2), (5), 90
D Limitation Act 1953 s 22, 22(1)
National Land Code ss 340, 340(1), (2), (2)(a), (2)(b), (3), (4)(b)
Penal Code s 468

Shakir Hussain a/l Kurshed Ibrahim (Kali & Assoc) for the plaintiff.
E *Russell Lua (Lua & Mansor) for the second defendant.*
Aufa bt Radzi (with Claudia Cheah and Chew Sue Peng) (Skrine) for the third defendant.

Evrol Mariette Peters J:

F INTRODUCTION

[1] In their claim, the plaintiffs sought relief pertaining to the ownership of four lots of land, two of which remained in the name of the first defendant, and the remaining two which were registered in the name of the second defendant G (after having them transferred by the first defendant). These remaining two lots were then charged by the second defendant in favour of the third defendant.

[2] The first defendant counterclaimed for, inter alia, vacant possession and H damages, whilst the second defendant counterclaimed for, inter alia, damages in the amount of the value or selling price of the relevant lots, including legal costs and costs involved in the transfer of those lots.

THE FACTUAL BACKGROUND

I

[3] The plaintiffs, pursuant to letters of administration dated 4 May 2001, are the co-administrators of the estate of one Ahmad bin Buang ('Ahmad'), who had since deceased. The first and second defendants are property developers, whilst the third defendant is a bank.

[4] The four property lots in dispute, which were part of a larger piece of land known as Lot 4868, are as follows: A

(a) Geran 316319 (previously held under HS(D) 302012) Lot No 29378 Mukim of Plentong, Daerah Johor Bahru, Negeri Johor ('Lot 430');

(b) Geran 316481 (previously held under HS(D) 301898) Lot No 29264 Mukim of Plentong, Daerah Johor Bahru, Negeri Johor ('Lot 607'); B

(c) Geran 316598 (previously held under HS(D) 302056) Lot No 29422 Mukim of Plentong, Daerah Johor Bahru, Negeri Johor ('Lot 716'); and

(d) Geran 316042 (previously held under HS(D) 302318) Lot No 29687 Mukim of Plentong, Daerah Johor Bahru, Negeri Johor ('Lot 97'). C

[5] In a nutshell, the plaintiffs' claim was that they were the beneficial owners of all the lots, having inherited them from the original purchasers who had paid the first defendant the full purchase price for them. It should be noted that Lots 430 and 607 remained registered in the name of the first defendant, whereas Lots 97 and 716 were sold by the first defendant to the second defendant, which then charged them to the third defendant. D

[6] With regard to Lots 430 and 607, the plaintiffs claimed, inter alia, that the first defendant had no more rights pertaining to those lots, and was holding it in trust for the plaintiffs who had inherited it from one Yusof bin Hashim ('Yusof') for Lot 430, and Ahmad for Lot 607. E

[7] With regard to Lots 97 and 716, the plaintiffs claimed, inter alia, that the first defendant had no more rights pertaining to those lots, and was holding it in trust for the plaintiffs who had inherited it from Ahmad. As such, the transfers of Lots 97 and 716 to the second defendant were null and void, and as a consequence, the charges registered pertaining to Lots 97 and 716 by the second defendant in favour of the third defendant were also null and void. F G

[8] The first defendant counterclaimed for vacant possession of Lots 430 and 607, for the SPAs pertaining to all the lots to be declared null and void; and for damages arising from the loss of use of Lots 430 and 607. H

[9] The second defendant counterclaimed for damages for delay in the construction of a purported project on Lots 97 and 716, or alternatively to pay for damages in the amount of the value or selling price of Lots 97 and 716, including legal costs and costs involved in the transfer of those lots. I

[10] The counterclaims of both the first defendant and second defendant were dismissed, whilst the plaintiffs' claim with regard to all the lots was allowed, for the following reasons.

A CONTENTIONS, EVALUATION, AND FINDINGS

[11] It was noted that since Lots 430 and 607 remained registered in the name of the first defendant, the second and third defendants, therefore, had no interest in those lots, and their attempts to challenge the plaintiffs' claim must be confined only to Lots 97 and 716. I was compelled to say this, at this juncture, as the second defendant had disputed the *Geran Tanah* under which Lots 607 and 716 were held, pursuant to a consent judgment dated 8 August 2018, entered into between the first defendant and one Kawate Yukio. In the first place, Lot 607 was of no concern to the second defendant, and secondly, that consent judgment was of no relevance to the plaintiffs' claim.

[12] It also had to be emphasised that the first defendant was wound-up on 13 July 2020 at the Penang High Court. However, after leave was obtained, this court was informed by the Jabatan Insolvensi Malaysia that, on behalf of the first defendant, it would not be defending the plaintiffs' claim.

[13] As such, the first defendant had not produced any witness to challenge the evidence adduced by the plaintiffs. In the circumstances, the plaintiffs' evidence against the first defendant stood unchallenged and unrebutted, as far as all lots were concerned.

[14] However, in the interest of completeness, several issues regarding the lots with regard to the plaintiffs' claim against the first defendant, were addressed. At the outset, it was also crucial to note the similarities between the plaintiffs' claim against the first defendant in the present case, and the claims made in the cases of *Rokiah bt Amat v Pembangunan Tanah dan Perumahan Sdn Bhd & Anor* [2021] 6 MLJ 877; [2021] MLRAU 144, and *Noraini bt Mohamed Hadi v Pembangunan Tanah dan Perumahan Sdn Bhd and another appeal* [2021] 4 MLJ 152; [2020] 4 MLRA 158. Hence, those cases were pivotal in the determination of the issues in the present case.

[15] At the outset, the second defendant contended that the plaintiffs' claim was flawed as there was purported confusion between the lots they were claiming and the parties they were claiming against. In my view, there was no confusion at all. The plaintiffs had to establish their claim against the first defendant for all lots on the basis that the lots had been sold to the predecessors of the plaintiffs. However, since two of the lots, namely Lots 97 and 716, had been transferred to the second defendant and subsequently charged to the third defendant, the plaintiffs had to bring this claim against the second and third defendants as well.

[16] The plaintiffs' narrative regarding Lot 430 was that it was assigned to the first plaintiff in 1993 on account of natural love and affection, from Yusof

who had since deceased. The first plaintiff claimed that Yusof had paid the full purchase price when he purchased Lot 430 from the first defendant, as evident from documents such as two letters dated 14 November 1992 between Yusof and the first defendant, and the deed of assignment between Yusof and the first plaintiff dated 19 January 1993.

[17] With regard to Lots 97, 607 and 716, the plaintiffs averred that the first defendant had sold the lots to Ahmad, before Lots 97 and 716 were subsequently transferred to the second defendant, which then charged it to the third defendant.

[18] At the outset it was stated that all matters concerning the estate of Ahmad were handled by the first plaintiff, ('PW1'). The plaintiffs' narrative pertaining to Lots 97, 607 and 716, began with sale and purchase agreements ('SPAs') dated 6 November 1967, 11 October 1967 and 20 March 1968 respectively. The SPAs were signed between Ahmad, and one Syed Ali bin Mohamed Al-Attas ('Syed Ali'), as the attorney, pursuant to a power of attorney dated 26 July 1967, for four individuals, namely, Syed Husain bin Junid, Syed Jaffar bin Alwee, Syed Yahya bin Junid, and Tengku Othman bin Abdullah ('the four individuals').

[19] The role of Syed Ali in these transactions was crucial, and the documentary evidence indicated that Syed Ali was the director of the first defendant, and that he, not only represented the four individuals, but had, in fact, acted on behalf of the first defendant when the sale and purchase of Lots 97, 607 and 716 had taken place. The following issue, therefore, revolved around the capacity of the four individuals at the material time, and the second defendant's averment that the first defendant was not the registered owner of Lots 97, 607 and 716 at the date of the SPAs.

[20] The matter that could not be ignored with regard to the relationship amongst the four individuals, Syed Ali and the first defendant was a letter dated 27 December 2005, from the first defendant to the police, wherein the four individuals were referred to as the beneficial owners, and that Syed Ali was their attorney through the power of attorney dated 26 July 1967. The letter reads:

> Merujuk perkara di atas, kami sahkan bahawa sebelum syarikat ini ditubuhkan pada bulan Disember 1967 beberapa usahawan perseorangan (disebut bagi Beneficial Owner) telah membeli (dengan surat perjanjian) sekeping tanah Lot 4648 CT 17421 (Estet) pada awal tahun 1967 dan mereka melantik Tuan Syed Ali Bin Mohamed Alattas sebagai Power Attorney bertarikh 26/7/1967.
>
> Beneficial Owner tersebut telah membuat perjanjian menjual lot-lot selaras dengan plan layout menerusi peguam.
>
> Beneficial owner telah menyerahkan Estet tersebut kepada Syarikat ini apabila syarikat ini telah ditubuhkan dan Estet ini telah didaftarkan diatas nama Syarikat

ini dalam bulan Disember 1967. *Semua surat perjanjian, harta dan liability dijadikan kepunyaan dan tanggungjawab syarikat ini mulai Disember 1967.*

Jesteru semua perjanjian yang dibuat oleh beneficial owner yang diwakili oleh Tuan Syed Ali Bin Mohamed Alattas adalah dianggap sebagai perjanjian jualbeli diantara Syarikat ini dan pembeli berkenaan. (Emphasis added.)

[21] This was fortified by the evidence of one of the four individuals, Syed Husain bin Junid ('PW3'), who testified that the SPAs for Lots 97, 607 and 716 were in actual fact between the first defendant and Ahmad.

Whether nemo dat rule applied to first defendant

[22] Following from the events that had transpired in 1967 and 1968 with regard to the SPAs for Lots 97, 607 and 716, the issue was whether *nemo dat quod non habet* applied to the first defendant, in view of the undisputed fact that the first defendant had become the registered owner of Lot 4868 (which was the larger piece of land encompassing all other lots) only on 18 May 1968, and therefore, was not in the position to enter into SPAs with regard to Lots 97, 607 and 716, on 6 November 1967, 11 October 1967 and 20 March 1968 respectively.

[23] In my view, although the first defendant may not have been the true owner when the SPAs for Lots 97, 607 and 716 were signed on 6 November 1967, 11 October 1967 and 20 March 1968 respectively, it was nevertheless the future owner, as all the rights in Lots 97, 607 and 716 had been transferred to the first defendant sometime in May 1968, rendering it with good title to pass to Ahmad, upon payment of the full purchase price.

[24] It is trite law that there is nothing inherently impossible in the performance of an agreement to sell land belonging to a third person. This means that 'one may contract to sell to another any defined subject-matter and can enforce the contract if by the time when he is obliged to do so, he has obtained a sufficient interest or can compel other interested parties to concur in the sale. It matters not at all that at the date of the contract he had no interest, if he obtained it in time to fulfil the bargain': per Harman J in *Harold Elliot Ltd v Pierson* [1948] 1 Ch 452, which was adopted and approved by Edgar Joseph Jr J in *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48. Reference was also made to *Sinniah a/l Pampayan v Muthuvelu Pillai a/l Palanichamy Pillai* [1997] 1 MLJ 403; [1964] 1 LNS 57.

[25] I also looked to the Court of Appeal case of *Besharapan Sdn Bhd & Ors v Agroco Plantation Sdn Bhd & Anor* [2007] 1 MLJ 101; [2006] 4 CLJ 878, where it was stated by Arifin Zakaria JCA (as he then was):

> Even though the second and third appellants did not have any registered right or interest in the subject land on the date of execution of the 1989 Agreement, that did not render the agreement, which was otherwise valid and enforceable, to be void or invalid. *The second and third appellants at the material time had sufficient interest in the subject land to enter into a binding agreement, by which they agreed to transfer the subject land when the title or interest in the subject land had been registered in their names*. In other words, the parties agreed that the agreement would only become enforceable the moment the second and third appellants' right or interest in the subject land was registered under the Ordinance. (Emphasis added.)

[26] Thus, when the SPAs were entered into for Lots 97, 607 and 716, on 6 November 1967, 11 October 1967, and 20 March 1968 respectively, the first defendant sold the land, not as the owner of the land but as a party which was going to own the land, and which it subsequently did, in May 1968. Furthermore, since the first defendant had received consideration for the SPAs, and that Ahmad had taken possession of Lots 97, 607 and 716, this court could have compelled the first defendant to perform the contract. Reference on this point was made to *Holroyd v Marshall* [1862] 11 ER 999.

[27] Similar issues were addressed in the Court of Appeal cases of *Rokiah Amat v Pembangunan Tanah Dan Perumahan Sdn Bhd* and *Noraini Mohamed Hadi v Pembangunan Tanah Dan Perumahan Sdn Bhd*.

[28] Coupled with the letter dated 27 December 2005, from the first defendant to the police, it was undeniable, therefore, that the first defendant had eventually become the vendor of the lots, which were sold by the four individuals through Syed Ali.

Whether first defendant was a bare trustee

[29] With regard to Lot 430, the first plaintiff's contention was that, since Yusof had paid the full purchase price of Lot 430 when he purchased it from the first defendant, the latter remained the bare trustee of Lot 430 on behalf of the first plaintiff, since Yusof had subsequently assigned it to the first plaintiff in 1993. It was also noted that it was the first plaintiff who paid the 'cukai pintu' and the 'cukai tanah' on Lot 430 from the time he took possession of it.

[30] The documentary evidence adduced with regard to Lot 430 was the two letters dated 14 November 1992 between Yusof and the first defendant, and the deed of assignment between Yusof and the first plaintiff dated 19 January 1993. In fact, by giving its prior consent to the assignment via letter dated 14 November 1992, the first defendant had acknowledged that Yusof had purchased Lot 430 from it, paid the full purchase price to the first defendant, and as such, had the right to assign Lot 430 to the first plaintiff. That letter

reads:

> Kami telah menerima surat daripada Encik Yusof bin Hashim *tuan punya harta tersebut diatas meminta hartanya dipindahmilik kepada* ALWI BIN AHMAD (lot 419/C) KP NO: 0992070 dan *MOHD AFFANDI BIN AHMAD (Lot 430/C) KP NP 1309381.*
>
> Bersama-sama ini dikembarkan fotokopi surat tersebut yang dengan sendirinya memberi erti.
>
> Pihak syarikat tidak ada apa-apa halangan terhadap pindahmilik tersebut. Sila sediakan suratan pindahmilik (deed of assignment and Power of Attorney) untuk ditandatatangani olih kedua-dua pihak. (Emphasis added.)

[31] A telling fact from the letter above is the reference made by the first defendant to Yusof being the 'tuan punya harta tersebut diatas meminta hartanya dipindahmilik', which had made it crystal clear that Yusof was in fact the owner of Lot 430, when he had assigned it to the first plaintiff.

[32] With regard to Lots 97, 607 and 716, the plaintiffs' contention was that since Ahmad had paid the full purchase price for the three lots when he purchased it from the first defendant, the latter remained the bare trustee for Lots 97, 607 and 716, on behalf of the first plaintiff, since the first plaintiff had inherited it from Ahmad. In support of this contention, the plaintiffs adduced ledgers prepared by the first defendant, and receipts issued by the first defendant for payment of RM586.50 for survey fees paid by Ahmad to the first defendant for Lots 97, 607 and 716.

[33] On each of these ledgers for Lots 97, 607 and 716, the instalment payments were reflected, including the last instalment which rendered payment in full of the purchase price of these lots. For Lot 97, the last instalment indicating payment of full purchase price was made on 11 December 1970; for Lot 607, it was 11 September 1967; whilst the full purchase price for Lot 716 was indicated by the last instalment payment on 14 August 1969. In addition, the ledgers and receipts for Lots 97, 607 and 716, contained the word 'jelas', which was indicative that the purchase price for Lots 97, 607 and 716 had been fully paid by Ahmad to the first defendant. The fact that Ahmad had built houses on Lots 97, 607 and 716 respectively, which he subsequently rented out, had fortified Ahmad's ownership of Lots 97, 607 and 716.

[34] The second defendant challenged the ledgers and receipts from the aspects of their veracity, accuracy and credibility.

[35] I was unable to agree with the second defendant for the reason that these documents had already been marked as exhibits at trial. Secondly, even if I were

to consider the challenge by the second defendant, ss 32 and 73A of the Evidence Act 1950 ('the Evidence Act'), which are exceptions to the rule against hearsay, would render the ledgers and receipts admissible. Section 32(1) of the Evidence Act, in particular para (b), is wide enough to cover all documents that were made in the ordinary course of business, including ledgers and receipts. Section 32(1)(b) of the Evidence Act reads:

> Section 32 — Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> ...
>
> (b) when the statement was made by any such person in the *ordinary course of business*, and in particular when it consists of *any entry or memorandum made by him in books kept in the ordinary course of business* or in the discharge of professional duty; or of an *acknowledgment written or signed by him of the receipt of money,* goods, securities or property of any kind; or of a *document used in commerce*, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him; (Emphasis added.)

[36] According to s 32(1) of the Evidence Act, the unavailability of the witness must first be established as was stated in *Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200. In the present case, the ledgers were documented more than 50 years ago, whilst the receipts were issued about 30 years ago. Ahmad was obviously no longer available, and neither were those who had executed the documents on behalf of the first defendant.

[37] Since the ledgers and receipts were documentary evidence, reference was also made to s 73A(1) of the Evidence Act, which reads:

> Section 73A — Admissibility of documentary evidence in civil cases, etc
>
> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either —
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as

A the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

B (b) if the maker of the statement is called as a witness in the proceedings:
Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success. (Emphasis added.)

C

[38] In addition to ss 32(1)(b) and 73A(1) of the Evidence Act, resort was also had to s 73A(2) of the Evidence Act, which allows the judge to exercise his discretion to dispense with both the maker of, and the original document, if he is satisfied that undue delay or expense would otherwise be caused. The subsection reads:

D

Section 73A — Admissibility of documentary evidence in civil cases, etc

...

E (2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) *shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —*

F (a) *notwithstanding that the maker of the statement is available but is not called as a witness*; and

(b) *notwithstanding that the original document is not produced*, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be G specified in the order or as the court may approve, as the case may be. (Emphasis added.)

[39] The discretion prescribed by s 73A(2) of the Evidence Act was exercised not only in *Arab-Malaysian Merchant Bank Bhd v Chong On Foh Medical Hall & Liquor Dealers* [1997] 4 MLJ 532; [1996] 2 CLJ 667, but also in *Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors* [2001] MLJU 125; [2001] 2 CLJ 474, and *Kubota Agricultural Machineary Sdn Bhd v Sharizan Sdn Berhad & Anor* [2001] MLJU 71; [2001] 6 CLJ 104.

H

I **[40]** In exercising my discretion under s 73A(2) of the Evidence Act, I was guided also by s 73A(5) which reads:

Section 73A — Admissibility of documentary evidence in civil cases, etc

...

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1) to (4), *the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances,* and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted. (Emphasis added.)

[41] This was fortified by the provision in s 90 of the Evidence Act which presumes the genuineness of the signatures on documents proved to be at least 20 years old. Section 90 reads:

Section 90 — Presumption as to documents 20 years old

Where any document purporting or proved to be twenty years old is produced from any custody which the court in the particular case considers proper, *the court may presume that the signature and every other part of that document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested* by the persons by whom it purports to be executed and attested.

Explanation — Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

Illustrations

(a) *A has been in possession of landed property for a long time. He produces from his custody documents relating to the land, showing his title to it. The custody is proper.*

(b) A produces documents relating to landed property of which he is the chargee. The chargor is in possession. The custody is proper.

(c) A, a connection of B, produces documents relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper. (Emphasis added.)

[42] 'Having regard to s 90 of the Evidence Act, the court may presume the genuineness of the signatures of the purported vendor and purchaser and the thumbprint of the purported person who witnessed the execution of the agreement': per KC Vohrah in *Ghazali bin Arifin v Ahmad bin Bakar & Ors* [1992] 1 MLJ 282.

[43] In the present case, the ledgers were more than 50 years old, whilst the receipts were close to 30 years. Since the presumption in s 90 of the Evidence Act had not been rebutted by the defendants, the ledgers and receipts which were adduced by the plaintiffs for Lots 97, 607 and 716 were not only admissible, they were authentic and credible.

[44] Relying on the Court of Appeal case of *Noraini Mohamed Hadi v Pembangunan Tanah Dan Perumahan Sdn Bhd*, the concept of bare trustee as alluded to above, applied with regard to the lots, and the first defendant became the bare trustee for Yusof with regard to Lot 430, and for Ahmad with regard to Lots 97, 607 and 716, and eventually for the first plaintiff, as assignee, and both plaintiffs as co-administrators.

Whether first defendant held Lots 430, 97, 607 and 716 in trust for deceased persons/plaintiffs

[45] The law on constructive trust has been elucidated by Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 499, as follows:

> It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that *the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser*, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession. *In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest)*, and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz, possession of the estate and a charge upon the estate for his purchase-money. (Emphasis added.)

[46] This principle has been assimilated in Malaysian Jurisprudence in numerous cases including *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors* [2014] 11 MLJ 422; *Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Ors* [2009] 2 MLJ 765; *JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal* [2016] 1 MLJ 341 (CA); and *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43.

[47] In *Samuel Naik Siang Ting v Public Bank*, the law on constructive trust was distilled by the Federal Court, through Ramly Ali FCJ, in the following

words:

> We are in full agreement and adopt the above well-founded principles of law which, according to Jessel MR in *Lysaght*'s case, 'has been settled for centuries'. Applying the said principles to the facts of the present case before us, we hold *that MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property);* and to borrow the words of Jessel, MR in *Lysaght*'s case '... the court will not permit the vendor afterwards to transfer the legal estate to a third person'. In other words, *MPM* in the present case, was therefore not permitted in law to sell or transfer the land to the new purchasers (including the appellant). The Court of Appeal was right in finding that MPM, after having entered in the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. (Emphasis added.)

[48] In a similar vein, in the present case, Ahmad had paid the full purchase price to the first defendant and was given possession of Lots 97, 607 and 716, whilst Yusof did the same for Lot 430.

[49] I also looked to the case of *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor*, where Idrus Harun JCA (as he then was) held that the second respondent in that case, which was in a similar position as the first defendant in this case, was a bare or constructive trustee.

[50] As such, the plaintiffs could enforce the trust against the first defendant, as it would be unconscionable for the first defendant to assert its right on the basis of its registered title, whilst denying the plaintiffs what is rightly theirs, bearing in mind that there was a strong element of unjust enrichment and lack of probity on the part of the first defendant: *JW Properties Sdn Bhd v Perbadanan Kemajuan Pertanian Selangor & Anor and another appeal*.

[51] I found guidance in the Court of Appeal case of *Noraini Mohamed Hadi v Pembangunan Tanah Dan Perumahan Sdn Bhd*, which was a crucial point of reference in the present case. In that case, the defendant, who was also the first defendant in the present case, had purchased a piece of land under a master title from one Kheng Hup Co Ltd, and subsequently became its registered owner in May 1968. The land purchased by the plaintiff was known as lot 536, which was part of several other lots of land forming part of the master title, which was still under the name of the defendant. The plaintiff claimed to have purchased the land from the first purchaser, one Jaafar. She then claimed the land from the defendant, on the basis that she had paid the full purchase price to Jaafar, and that Jaafar had paid the defendant in full. The defendant in that case, however, denied having sold the land to Jaafar. One of the issues that arose was whether

the defendant, in accepting the full purchase price from Jaafar, was a bare trustee with respect to lot 536. In answering the question in the affirmative, it was explained by Lee Swee Seng JCA in the following passage:

> [136] The position of the law is as clear as broad daylight in that *a vendor who had received the full purchase price to a property is a bare trustee for the purchaser and a court of law would impose on the vendor a constructive trust,* holding the property for the purchaser and persons deriving title or claiming title through the purchaser as in this case. (Emphasis added.)

[52] The second defendant, in its submissions, argued that the facts of the case in *Noraini Mohamed Hadi v Pembangunan Tanah Dan Perumahan Sdn Bhd* were distinguishable, and as such, this court was not bound to follow it. I was unable to agree with the second defendant as the facts pertaining to the sale and purchase of land between the first defendant and Yusof/Ahmad were similar and thus, the principles enunciated in *Noraini Mohamed Hadi v Pembangunan Tanah Dan Perumahan Sdn Bhd* were relevant and applicable to the present case.

Whether first defendant's title was defeasible

[53] In the pleadings, the first defendant claimed that its title was indefeasible by virtue of s 340(1) of the National Land Code ('National Land Code').

[54] The second defendant, in challenging the plaintiffs' claim against the first defendant, contended that there were no exceptions in s 340(2) of the National Land Code, that would defeat the first defendant's title. Section 340 of the National Land Code reads:

> Section 340 — Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) *The title or interest of any person or body* for the time being registered as proprietor of any land, or in whose name any lease charge or easement is for the being registered, *shall subject to the following provisions of this section, be indefeasible.*
>
> (2) The title or interest of any person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent —

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) *the determination of any title or interest by operation of law.* (Emphasis added.)

[55] The second defendant further argued that reliance should not be placed by this court on my decision in *Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd* [2020] 12 MLJ 786, as the second defendant claimed that in that case, I was influenced by the contention that Lee Ban Heng, a former director of, and witness for the first defendant, had perpetrated fraud.

[56] In *Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd*, there were several allegations made towards Lee Ban Heng, and his involvement in fraudulent activities, which purportedly deprived several purchasers of lots of land that they had purchased from the first defendant. In fact, Lee Ban Heng had then, been charged in the magistrate's court under s 468 of the Penal Code.

[57] In support of the contention that my finding of fact regarding Lee Ban Heng was wrong, the second defendant had filed an application in encl 71 to adduce further evidence. Although filed considerably late in the day, that is, after the trial had already concluded, it was heard, considered, and allowed.

[58] However, in my view, the facts revolving around Lee Ban Heng were irrelevant to the plaintiffs' claim in the present case, as the plaintiffs had made it very clear that they were not pursuing the issue of fraud against the first defendant, and as such, that was not the premise of the plaintiffs' claim against the first defendant.

[59] Secondly, I was compelled to state that my decision in *Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd* was not based on fraud alone, as found in s 340(2)(a) of the National Land Code. In fact, a scrutiny of my judgment would indicate that I had also relied on s 340(4)(b) of the National Land Code to conclude that the first defendant's title was defeasible. Section 340(4)(b) of the National Land Code which states 'nothing shall prejudice or prevent the determination of any title or interest by operation of law', deals with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in s 340(2) of the National Land Code. This was explained in the cases of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96 and *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636.

[60] In *Ong Chat Pang v Valiappa Chettiar*, it was explained by Suffian FCJ, referring to *Das on Torrens System* in Malaysia:

> 'Operation in law' is a generic term deliberately used by the legislature to grant relief in cases where *contractual or conscientious obligations* (importing a breach of duty to which equity has attached its sanction) are *undertaken by or imposed on the registered proprietor either at law or in equity*. (Emphasis added.)

[61] This passage was endorsed by Gopal Sri Ram JCA (as he then was) in the Federal Court case of *Krishnadas Achutan Nair & Ors v Maniyam Samykano*, where in explaining that 'Parliament does not legislate in vain' by the use of meaningless words and phrases, His Lordship further explained the meaning of s 340(4)(b) of the National Land Code, in the following passage:

> In our judgment, *Parliament enacted* s 340(4)(b) *for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second subsection to* s. 340 *of the Code*. While recognising that it is neither possible, nor desirable to predict with any degree of certainty the wide range of cases that, while failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b), ... (Emphasis added.)

[62] Therefore, the role of Lee Ban Heng would not have affected my decision in *Hamdiah bt Ahmad & Anor v Pembangunan Tanah dan Perumahan Sdn Bhd*. In the present case, the first defendant was merely a bare trustee based on my finding of fact that full payment of the purchase price for Lots 430, 97, 607 and 716 had been made. As such, pursuant to s 340(4)(b) of the National Land Code, the first defendant was contractually and conscientiously obliged to have registered Lot 430 in the name of Yusof/the first plaintiff, and Lots 97, 607 and 716 in the name of Ahmad/first plaintiff.

Whether plaintiffs' claim was time-barred

[63] The issue of whether the plaintiffs' claim was statutorily time-barred pursuant to s 22 of the Limitation Act 1953 ('the Limitation Act'), or whether it fell within the purview of laches arose, since the lots were purchased by Yusof and Ahmad respectively, more than 50 years ago. Section 22(1) of the Limitation Act reads:

> Section 22 — Limitation of actions in respect of trust property No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) *to recover from the trustee trust property* or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use. (Emphasis added.)

[64] Pursuant to s 22 of the Limitation Act, by virtue of being a beneficiary under a trust, the plaintiffs' claim against the first defendant with regard to all the lots was not statutorily time-barred.

[65] Furthermore, it is trite law that limitation period starts to run when 'there is a clear and unequivocal threat to dispossess the plaintiffs from the land by the defendant': *Nasri v Mesah* [1971] 1 MLJ 32. In this case, if at all limitation applied, time should have run from the date of any infringement or threat of infringement of the plaintiffs' rights derived from the SPAs. I drew guidance also from the cases of *Mt Bolo v Mt Koklan & Ors* [1930] AIR PC 270, and *Wong Sin Meng v Wong Sum Moi & Anor* [1991] 2 MLJ 277.

[66] The facts reveal that the first defendant had given possession of Lot 430 to Yusof, and Lots 97, 607 and 716 to Ahmad, and that they had both erected houses on those lots. All this while, neither Yusof, Ahmad nor the first plaintiff had been asked by the first defendant to vacate the lots. It was also crucial to note that these facts were not challenged at all by the defendants.

[67] It had also transpired, from the evidence that Ahmad, and the first plaintiff had, from time to time, made efforts to see the first defendant and its representatives for the transfer of the title of Lots 97, 607 and 716 to Ahmad, but was told that steps had been taken to subdivide the master title into individual titles. However, neither Ahmad nor the first plaintiff had been updated by the first defendant regarding the status of the lots.

[68] It appeared, therefore, that the first defendant had never denied the rights of Yusof or Ahmad or the first plaintiff to the lots. Since limitation period started to run only from the first clear and unequivocal threat to dispossess the plaintiffs of the lots, in the present case, that would have been 7 January 2020,

A that is, the date on which the first defendant had filed its defence and counterclaim. As such, the plaintiffs' claim was not statutorily time-barred.

[69] A related argument against the plaintiffs was that they should be denied relief due to laches and delay. At this juncture, reference was made to s 32 of the
B Limitation Act, which reads:

> Section 32 — Acquiescence
>
> Nothing is this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

C

[70] Laches is established when two conditions are fulfilled. First and foremost, there must be unreasonable delay in the commencement or prosecution of proceedings. Secondly, in all the circumstances, the
D consequences of delay must render the grant of relief unjust.

[71] The often-cited principle on laches is found in the enlightening passage by Lord Selborne in the landmark case of *Lindsay Petroleum Company v Hurd* (1874) LRPC 221:

E

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. *Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval*, which might
F affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy. (Emphasis added.)

[72] Laches had been aptly described as 'inaction with one's eyes open' by
G Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. *A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time*. He is then said to be barred by
H laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a
I waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'. (Emphasis added.)

[73] The facts of the present case, however, demonstrate that Yusof and Ahmad, after being given vacant possession of the lots, remained in possession, in Yusof's case regarding Lot 430, until he had assigned it to the first plaintiff, and in Ahmad's case regarding Lots 97, 607 and 716, until his death. This was an important factor, explained in *Williams v Greatrex* [1957] 1 WLR 31, in the following passage:

> That the purchaser having paid the deposits on and having entered into possession of the land, became the equitable owner of the land under a contract binding on the vendor such that *the vendor could not now object to specific performance on the ground of laches unless he could show that he had not acquiesced in the purchaser's acts of possession* or that the purchaser had abandoned the contract and that the evidence showed sufficient acquiescence by him and no abandonment by the purchaser. Accordingly, despite the lapse of time, the purchaser was entitled to specific performance on payment of the balance of the price and interest thereon for the intervening years. (Emphasis added.)

[74] Thus, if the first defendant had intended to exclude the Yusof, Ahmad or the plaintiffs, it ought to have taken possession of the lots, which it never did. As such, laches or delay was not a bar to this action, since possession itself by Ahmad, and Yusof 'was an assertion on their part of their right under the contract of purchase, and acquiescence of their possession is a recognition by the first defendant of their right': *Mills v Haywood* (1877) 6 Ch D 196.

Whether credibility of plaintiffs' witnesses had been compromised

[75] It is trite law that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived at in the absence of a judicial appreciation of evidence is liable to appellate correction. 'Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses': per Gopal Sri Ram JCA (as he then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62.

[76] Both second and third defendants contended that the credibility of the plaintiffs as witnesses (PW1 and PW2), had been compromised as they were assisted by a third-party during proceedings and, therefore, their evidence was coached.

A [77] First and foremost, I am compelled to state that the proceedings were conducted online via Zoom, and that this mode had been agreed to by all parties, after considering the delay that had already been caused by the winding up of the first defendant, and the Covid-19 pandemic. As such, the parties had also agreed, bearing in mind the age of the plaintiffs who were in their 70s and B 60s respectively, that a third party would assist, as long as that third party was not a family member.

[78] Secondly, based on my close observation, the assistance was given in respect of the documents that were referred to. Since the documents were C voluminous, some latitude was given to PW1 and PW2, to ensure that they were referring to the right page, and that they understood the questions put to them.

D [79] With regard to PW2, she had already stated in her witness' statement that all minute details regarding the management of the estate of Ahmad with respect to Lots 97, 607 and 716 were handled by PW1.

[80] In my view, therefore, the third party had not coached them into giving E answers.

[81] In any event, I would have to agree with counsel for the plaintiffs, that the plaintiffs' claim was based largely on contemporaneous documents. The purported coaching that the second and third defendants had referred to, F therefore, had no bearing on the conclusion that I had arrived at.

[82] As such, I had no reason to disbelieve the plaintiffs. In fact, their testimony was consistent with the documents that were before me.

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[83] Both second and third defendant also submitted that the evidence of PW3 should be treated with caution. In my view, the evidence of PW3 was neutral. He was one of the four individuals, and had confirmed the sale by the first defendant. Although there were certain questions he was unable to answer H due to the failure to recall events that took place five decades ago, on the whole I found no reason to disbelieve him.

[84] In the final analysis, what needed to be emphasised was that the I plaintiffs' evidence remained unrebutted, as the first defendant had not produced any witnesses. All challenges to the evidence adduced by the plaintiffs were from the second and third defendants, but whose witnesses claimed that they had no direct knowledge of what had transpired between the first defendant and Yusof, Ahmad or the first plaintiff.

[85] The unrebutted evidence with regard to Lot 430, therefore, was as follows:

(a) that Lot 430 was purchased by Yusof from the first defendant, by paying the full purchase price;

(b) that Lot 430 was assigned by Yusof to the first plaintiff; and

(c) that the first defendant, was not only a bare trustee to Yusof, it was also a bare trustee to the first plaintiff after Yusof had assigned Lot 430 to the first plaintiff.

[86] The unrebutted evidence with regard to Lots 97, 607 and 716 was as follows:

(a) that Ahmad had purchased Lots 97, 607 and 716 from the first defendant;

(b) that Ahmad had paid the first defendant full purchase price for Lots 97, 607 and 716;

(c) that Ahmad had taken possession of Lots 97, 607 and 716 and built permanent structures on such lots; and

(d) that the plaintiffs as the co-administrators of the estate of Ahmad are the rightful owners of Lots 97, 607 and 716.

[87] It is trite law, on the authorities of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, *Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim* [2009] 2 MLJ 685; [2008] 1 LNS 669 and *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64; [2013] 5 CLJ 949, that if the court has before it, positive and unrebutted evidence from the plaintiff that supports the facts in issue, then judgment must be given in favour of the plaintiff.

[88] In the present case, not only did the plaintiffs' evidence remain unrebutted, I would go a step further to say that they had proved, on a balance of probabilities, their claim against the first defendant vis a vis all lots.

Whether second defendant's title with regard to Lots 97 and 716 was defeasible

[89] Having arrived at the conclusion that the first defendant's title was defeasible by virtue of the fact that it held all the lots in trust, the issue that arose was whether, after having transferred Lots 97 and 716 to the second defendant, the registered title of the second defendant was also defeasible.

[90] At this juncture, it was crucial to note that the second defendant was the

A subsequent purchaser, and as such, the relevant provision applicable to it was s 340(3) of the National Land Code, which reads:

> Section 340 — Registration to confer indefeasible title or interest, except in certain circumstances
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> B ...
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be *liable to be set aside in the hands of any person or body to whom it may* C *subsequently be transferred*; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> *Provided* that nothing in this sub-section shall affect any title or interest acquired by D any purchaser in *good faith and for valuable consideration,* or by any person or body claiming through or under such a purchaser. (Emphasis added.)

[91] A reading of s 340(3) of the National Land Code would indicate that as a general rule, if the first defendant's title is defeated, then so is the title or E interest of any person that was subsequently granted by the first defendant. This is based on the rule that 'you cannot give what you do not have' or *nemo dat quod non habet,* a doctrine which was explained by Arifin Zakaria CJ in *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188, in the following passage:

> F The *nemo dat* rule literally means 'no-one can transfer what he has not got' (*Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Limited* [1949] 1 KB 322 as per Denning LJ). This is sometimes called the 'derivation' principle: the transferee's rights derived from those of the transferor. *The nemo dat rule protects the true owner of the goods* (right of ownership) and the innocent purchaser who G purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none. In other words, the right of the true owner is retained in the event of his possession is being stolen or sold to the unsuspecting purchaser. (Emphasis added.)

H **[92]** The exception to *nemo dat quod non habet* is where the subsequent transferee is able to prove that it falls within the category of bona fide purchaser for valuable consideration. Proof of these requirements, found in the proviso to s 340(3) of the National Land Code, would revive the title of the subsequent purchaser, which in this case was the second defendant. On this point, I found I guidance in the Court of Appeal case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526, where it was stated by Gopal Sri Ram JCA (as he then was) in the following passage:

> The appellant's case must succeed because the vendors had no title to pass. You cannot give what you do not have — *nemo dat quod non habet. And the only exception*

is in favour of a bona fide purchaser. ... (Emphasis added.)

[93] The workings of the subsections in s 340 of the National Land Code are based on the concept of deferred indefeasibility, which is part and parcel of the Malaysian Torrens system.

[94] The burden was, therefore, on the second defendant to prove that it was a bona fide purchaser for value, rather than for the plaintiffs to prove that the second defendant did not act in good faith. I was guided by the Court of Appeal case of *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals* [2007] 4 MLJ 489; [2007] 3 CLJ 97, where it was stated by Gopal Sri Ram JCA (as he then was), in the following passage:

> ... Note that sub-s (3) in paras (a) and (b) employs the word 'subsequently'. What it means is this. If a registered proprietor gets on the register by any of the means set out in s 340(2), and if he or she to use the expression housed in the Code — subsequently — transfers his or her land to another, the title of that other is also defeasible unless he or she is a purchaser on good faith and for valuable consideration. Also protected are persons who take from such a purchaser. I may add that *the proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it*... (Emphasis added.)

[95] The first issue, therefore, was whether valuable consideration was provided by the second defendant with regard to Lots 97 and 716. 'Valuable consideration' is a crucial ingredient of the proviso to s 340(3) of the National Land Code. The rationale for this ingredient was explained in *Mahidon Nichiar bte Mohd Ali and others v Dawood Sultan Kamaldin* [2015] 5 SLR 62, in the following passage:

> The rationale for this exception to the principle of indefeasibility of title is explained by John Baalman, the draftsman of the Land Titles Ordinance 1956 (Ord 21 of 1956) (the earliest predecessor of the LTA), in his commentary *The Singapore Torrens System (The Government of the State of Singapore, 1961)* at p 86:
>
> > *The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to that risk, there is no need to protect him* .... (Emphasis added.)

[96] In the present case, the transaction between the first and second defendant pursuant to a sale and purchase agreement dated 8 August 2018 ('SPA of 8 August 2018'), had features that were very uncharacteristic of a sale and purchase of a piece of land. For instance, there was no cogent evidence of any deposit or balance purchase price that was to be made pursuant to the SPA of 8 August 2018. The deposit payable was prescribed by cl 2 of the SPA of 8

August 2018, read together with cl 8 of the First Schedule to that SPA. The balance purchase price payable was a term in cl 3 of the SPA of 8 August 2018, read together with cl 11 of the First Schedule to that SPA.

[97] There was no evidence of such payment made. In fact, the evidence provided by the second defendant's first witness, who was its director, Chan Jui Hui ('DW1'), was unconvincing as he was unable to explain the details of the sale and purchase of Lots 97 and 716. He had even contradicted the evidence of the second defendant's second witness and solicitor, one Wong Yen Chnan ('DW2'), when he said that the money was paid through the second defendant's solicitors. DW2 had denied receipt of any such payment, but informed the court that there was merely an acknowledgment from the first defendant, stating that it had received the monies from the second defendant, although no such acknowledgment was adduced in court. DW1 subsequently confirmed that there were no documents whatsoever in the bundle of documents to prove that the second defendant had made payment to the first defendant for the purchase price of the lots.

[98] The contradiction of the second defendant's own witnesses fortified the plaintiffs' contention that the second defendant was merely a volunteer pursuant to the SPA of 8 August 2018.

[99] In my view, it was incredulous that there was no proof whatsoever of any payment made by the second defendant for the purchase of Lots 97 and 716, bearing in mind that balance purchase price was to be made by 8 November 2018, that is, three months from the date of the SPA of 8 August 2018. This is fortified by the fact that there was also no evidence of any request made by the second defendant for an extension of time to make such payment as stipulated in cl 6 of the SPA of 8 August 2018.

[100] Based on the aforesaid evidence, or lack thereof, it was my finding, that the second defendant was a mere volunteer, and, therefore, could not avail itself of the proviso to s 340(3) of the National Land Code. Alluding to established principles pertaining to the Torrens system registration of land, therefore, as a volunteer and not a purchaser for valuable consideration, the second defendant did not need any protection.

[101] The issue of the good faith of the second defendant was also in the forefront, bearing in mind that the second defendant was a subsequent transferee and, as such, had the burden of proving the requirements in the proviso to s 340(3) of the National Land Code.

[102] 'Good faith' in the context of the proviso to s 340(3) of the National Land Code includes due inquiry, and implies not only an upright mental

attitude, and clear conscience of a person, but also the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable man. It contemplates an honest effort to ascertain the facts upon which exercise of the power must rest; it must, therefore, be summed up as 'an honest determination from ascertained facts. Although the phrase may vary in the context of a different statute, subject and situation, honest intent free from taint or fraud, or fraudulent design, is a constant element of its connotation': per Azahar Mohamed FCJ in *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711; [2018] 6 CLJ 1.

[103] 'Good faith' on the transferee's part must involve more than a belief that all the steps have been regularly and properly done; the transferee must have no reason to believe that there is anything dubious about the transaction. 'In this context, the transferee's acting in good faith must also involve his not having knowledge about the fraudulent intent of the transferor. I will, therefore, consider good faith and knowledge together': per Judith Prakash J in *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd* [2004] 4 SLR(R) 365.

[104] Since good faith and knowledge have to be considered in juxtaposition, my finding was that the second defendant was deemed to have had the knowledge of the plaintiffs' occupation of Lots 97 and 716, based on cl 15 of the SPA of 8 August 2018, which reads:

> The Purchaser will be *deemed to have inspected* the property and will be *deemed to have notice* in all respects *of the actual state and condition of the property sold* and will take the property as it is. (Emphasis added.)

[105] As such, it was inequitable for the second defendant to now claim that it had purchased Lots 97 and 716 in good faith.

[106] What rendered the subsequent transaction more dubious and suspicious was the fact that the registration of Lots 97 and 716 in the second defendant's name had taken place only on 2 June 2019, despite the fact that the SPA of 8 August 2018 was completed in November of 2018.

[107] A holistic evaluation of the evidence led this court to the irresistible inference that the sale and purchase of Lots 97 and 716 by the second defendant was not done in good faith, and neither was there valuable consideration, leading to the conclusion that the title of the second defendant to Lots 97 and 716 must be set aside. At this juncture, I also have to add that during the trial, the second defendant had dedicated more time and effort in

attempting to challenge the plaintiffs' claim vis a vis the first defendant, rather than proving the requirements of bona fide purchaser for valuable consideration.

Whether charges registered in favour of third defendant were valid

[108] Much was submitted about whether the third defendant was a purchaser in good faith and for valuable consideration. The third defendant had strenuously argued that it was so, as it claimed to have had no knowledge of the on-goings between the first and second defendant. In relying heavily on the Federal Court case of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553; [2019] 3 CLJ 441, the third defendant contended that it was a bona fide purchaser for valuable consideration, and as such, the plaintiffs' claim against it should fail.

[109] I was unable to agree with the contention of the third defendant for the following reasons. First and foremost, it was crucial to note that the third defendant derived its interest from the second defendant, and not the first defendant. Since it had acquired an interest from the second defendant, the relevant provision is the following part of the proviso to s 340(3) of the National Land Code:

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, *or by any person or body claiming through or under such a purchaser.* (Emphasis added.)

[110] In the present case, a scrutiny of that part of the proviso is crucial. The word 'purchaser' in the proviso refers to the second defendant, and 'any person or body claiming through or under such a purchaser', refers to the third defendant. Since the third defendant's interest was granted by the second defendant, its interest depended on the title of the second defendant, and was protected, only if the second defendant was a purchaser in good faith and for valuable consideration. Since it was my finding that the second defendant had failed to establish that it was a purchaser in good faith and for valuable consideration, its title remained defeasible and, as such, the third defendant's registered charges were also defeasible. It did not matter if the third defendant was a bona fide purchaser for valuable consideration when it had agreed for the charges on Lots 97 and 716 to be registered in its favour, as the third defendant

was not a subsequent transferee and as such, the requirements of bona fide purchaser for valuable consideration did not apply to the third defendant.

[111] Reference on this point was also made to *Land Law in Malaysia (Cases and Commentary)* by Teo Keang Sood and Khaw Lake Tee where the learned authors opined:

> By way of illustration, take for instance a case where B fraudulently transferred to himself a piece of land which belonged to A to himself. By virtue of section 340(2)(b), B's title is liable to be set aside at the instance of A on the ground of fraud. Assuming that B transfers the same piece of land to C, C's title is also liable to be set aside by A *and so is any interest, for example, any charge, or lease, granted by C unless C is a purchaser in good faith and for value* in which case his title or interest will be indefeasible. (Emphasis added.)

[112] In the above illustration, B is the first defendant whilst C is the second defendant. It follows, therefore, that any charge granted by the second defendant is liable to be set aside unless the second defendant proves that it was a bona fide purchaser for value, which in this case, it had failed to do so.

[113] In my view, therefore, reliance on the case of *Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals* [2019] 2 MLJ 553; [2019] 3 CLJ 441 was misplaced since in that case, the bank which the land had been charged to, had premised its claim through the subsequent transferee who was, in fact, found to be a bona fide purchaser for value. In the present case, it was my finding that the second defendant was not a bona fide purchaser for value, and as such, it was in no position to register charges on Lots 97 and 716 in favour of the third defendant. The third defendant's recourse, if at all, would be against the second defendant.

[114] In any event, 'good faith' refers to the doing of an act, showing that ordinary prudence has been exercised according to the standards of a reasonable man. It contemplates an honest effort to ascertain the facts upon which exercise of the power must rest.

[115] In the present case, the third defendant's witness, one Yew Geok Hua, who was the Specialist Prevention and Monitoring in the Business Banking of the third defendant ('DW3'), had confirmed that the loan provided to the second defendant was in the amount of 55% of the purchase price, and that such loan was on a reimbursement basis, which meant that the amount would be paid to the second defendant after the charge documents were filed at the Land Office. She further testified that the payment of the loan sum was never made directly to the first defendant, and that no enquiries were made by the third defendant to ascertain if any monies had actually been transferred by the second defendant to the first defendant.

[116] In my view, this was sufficient to put the third defendant on notice of the suspicious nature of the purported sale and purchase of the lots between the first and second defendants, and the failure of the third defendant to make further enquiries had rendered an absence of bona fide on its part.

[117] The issue of valuation was also raised by the plaintiffs and, although DW3 testified that a valuation was conducted by the third defendant, no valuation report was adduced as evidence. In fact, I had to agree with the plaintiffs that if a proper valuation together with a site visit had been conducted, the third defendant would have known that although the loan was provided to the second defendant on the premise that the land was empty, it was, in fact, not the case, as the third defendant would have known that the lots were occupied, as permanent structures were in fact built on it.

[118] In the final analysis, the facts were indicative that the third defendant had not conducted a proper due diligence exercise to ascertain the genuineness of the sale and purchase of Lots 97 and 716 between the first and second defendants, and, as such, rendered an absence of good faith on the part of the third defendant.

Whether first defendant's counterclaim had been proved

[119] The first defendant counterclaimed, inter alia, for vacant possession of Lots 430 and 607; for the SPAs pertaining to all the lots to be declared null and void; and damages arising from the loss of use of Lots 430 and 607.

[120] It should be emphasised that the first defendant did not pursue its counterclaim, and on that premise alone, its counterclaim should be dismissed. In any event, based on my findings, the first defendant was merely the bare trustee for Yusof/first plaintiff for Lot 430 and for Ahmad/first plaintiff for Lots 97, 607 and 716. As such, there was no basis for the first defendant's counterclaim.

[121] It was also my view that the first defendant should be estopped from counterclaiming, due to its inaction in the last 50 years or so. It is trite law that, save for exceptional circumstances, courts should be slow to entertain an indolent litigant. The undisputed facts were that, with regard to the lots, Yusof and Ahmad had built houses on the lots, and had rented out such houses. However, they had never been asked or demanded to vacate the lots, which was indicative of acquiescence on the part of the first defendant.

[122] In fact, the first defendant was not here to explain the lack of promptitude in reclaiming the lots. This reinforced the plaintiffs' contention that Yusof and Ahmad were the rightful owners of the lots and, as a result of

having inherited such lots, the first plaintiff had stepped into the shoes of Yusof as assignee, and both plaintiffs into the shoes of Ahmad as co-administrators.

Whether second defendant's counterclaim had been proved

[123] The second defendant counterclaimed for damages for delay in the construction of a purported project on Lots 97 and 716, or alternatively for damages in the amount of the value or selling price of Lots 97 and 716, including legal costs and costs involved in the transfer of Lots 97 and 716.

[124] Since it was my finding that the first defendant was merely a bare trustee for Lots 97 and 716 on behalf of Ahmad, there was no title that could be transferred to the second defendant. As a result of the failure of the second defendant to prove that it was a bona fide purchaser for valuable consideration, the title of the second defendant was set aside, and as result thereof, the second defendant's counterclaim was also dismissed.

[125] Bearing in mind that the second defendant had the legal burden to prove its counterclaim on a balance of probabilities, it was my view that it had failed to do so.

CONCLUSION

[126] In the final analysis, and after careful scrutiny and judicious consideration of all the evidence before this court, including the submissions of all parties, it was my finding that the plaintiffs had proved, on a balance of probabilities, their claim against the first defendant with regard to all the lots. As a result thereof, their claim with regard to Lots 97 and 716 against the second and third defendants was also established.

[127] Since the second defendant had failed to prove that it was a bona fide purchaser for valuable consideration, its title was defeated. As such, the charges registered in favour of the third defendant were also defeated, since the third defendant was claiming under the second defendant. In any event, it was also my finding that the third defendant had failed to prove that they were bona fide purchasers.

[128] Having said that, although the plaintiffs' claim was allowed in principle, I dismissed the plaintiffs' claim for general damages as I was of the view that there was no justification for the same.

[129] With regard to the counterclaims of the first and second defendant, it was my view that both defendants had failed to prove on a balance of probabilities, their counterclaims against the plaintiffs.

A **[130]** An award of costs from both the second and third defendant was made in favour of the plaintiffs.

Plaintiff's claims allowed and defendants' counterclaims dismissed.

B Reported by Ashok Kumar

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